No. 75-1602

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

E. I. DU PONT DE NEMOURS AND COMPANY, AND PPG INDUSTRIES, INC. *Petitioners,*

v.

ENVIRONMENTAL PROTECTION AGENCY, *Respondent.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statutes Involved	3
Statement of the Case	4
Proceedings Before EPA	5
Proceedings in the Court of Appeals	9
Reasons for Granting the Writ	13
I. The Administrator Violated the Requirements of Due Process and the Administrative Procedure Act	14
II. Authority Has Not Been Delegated by Congress to the Administrator to Make a Discretionary Policy Judgment Based Upon Speculative and Inconclusive Scientific and Medical Evidence	19
III. Judicial Review of Agency Rulemaking That Is Based Upon Scientific and Medical Evidence Requires a Thorough Examination by the Court of the Evidence Relied Upon by the Agency To Determine Whether There Has Been a Clear Error of Judgment	23
Conclusion	29

TABLE OF AUTHORITIES

Page

CASES:

Amoco Oil Co. v. EPA, 163 U.S. App. D.C. 162, 501 F.2d 722 (1974) 6

Bowman Transp. Inc. v. Arkansas-Best Freight Sys., 419 U.S. 281 (1974) 17

Buckeye Power Inc. v. Environmental Protection Agency, 481 F.2d 162 (6th Cir. 1973) 17

Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402 (1971) 13, 23, 25, 26, 28

International Harvester Co. v. Ruckelshaus, 155 U.S. App. D.C. 411, 478 F.2d 615 (1973) 17, 26, 27

Industrial Union Department v. Hodgson, 162 U.S. App. D.C. 331, 338-9, 499 F.2d 467, 474-5 (D.C. Cir. 1975) 26

National Tire Dealers and Retreaders Association v. Brinegar, 160 U.S. App. D.C. 238, 244, 491 F.2d 31, 35 (D.C. Cir. 1974) 26

Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 163 U.S. App. D.C. 111, 114, 512 F.2d 1351, 1354 (D.C. Cir. 1975) 27

Natural Resources Defense Council, Inc. v. Environmental Protection Agency (No. 72-2233) 7

O'Donnelly v. Schaffer, 160 U.S. App. D.C. 266, 269, 491 F.2d 59, 62 (D.C. Cir. 1974) 27

Portland Cement Ass'n. v. Ruckelshaus, 158 U.S. App. D.C. 308, 486 F.2d 375, 393 (1973), cert. denied 417 U.S. 921 (1974) 17, 26

Rodway v. United States Department of Agriculture, 168 U.S. App. D.C. 387, 514 F.2d 809 (D.C. Cir. 1975) 17

Page

STATUTES AND RULES:

Federal Rules of Appellate Procedure Rule 41(b) ... 2

5 U.S.C. § 553(c) 4, 16

5 U.S.C. § 706(2)(D) 16

28 U.S.C. § 1254(1) 2

42 U.S.C. § 300j-6 27

42 U.S.C. § 1857f-1 .....5, 22

42 U.S.C. § 1857f-6c(c)(2)(A) 22

42 U.S.C. § 1857f-6c(c) 3

42 U.S.C. § 1857h-5(b)(1) 27

42 U.S.C. § 1857c-6, 1857c-7, 1857f-1, 1857f-6c, 1857f-9 27

42 U.S.C. § 4915 27

MISCELLANEOUS:

H. Rep. No. 91-1146, 91st Cong., 2d Sess. 13 (1970) .. 22

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Petitioners, E. I. Du Pont de Nemours and Company, and PPG Industries, Inc., pray that a writ of certiorari issue to review the opinion and judgment of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The opinion en banc of the United States Court of Appeals for the District of Columbia Circuit of March 19, 1976, is reported at 8 ERC 1785. It is also set

forth in a volume separately submitted to the Court as a Joint Appendix by these petitioners and other parties who participated in the case below.[1] The opinion of the Administrator of the Environmental Protection Agency (hereinafter "EPA") in the form of a preamble to the regulations challenged in this case appears at 38 Fed. Reg. 33734-33741. Pertinent portions of his opinion are included in the Joint Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on March 19, 1976. Issuance of the mandate has been stayed pending the filing of a petition to this Court for a Writ of Certiorari, as provided in Rule 41(b) of the Federal Rules of Appellate Procedure, by an order of the Court of Appeals entered pursuant to a joint motion submitted by all petitioners and the EPA. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the Administrator of the Environmental Protection Agency, acting under an order of the Court of Appeals directing final action within thirty days, satisfied the requirements of due process and the Administrative Procedure Act where interested per-

[1] This Appendix represents the Court's opinion in E. I. Du Pont de Nemours and Company v. Environmental Protection Agency (No. 73-2269), PPG Industries, Inc. v. Environmental Protection Agency (No. 73-2268), Ethyl Corporation v. Environmental Protection Agency (No. 73-2205), Nalco Chemical Company v. Environmental Protection Agency (No. 73-2270), and National Petroleum Refiners Association v. Environmental Protection Agency (No. 74-1021), all of which involve judicial review of the same EPA regulations. It is petitioners' understanding that Ethyl, Nalco and National Petroleum Refiners Association are separately filing petitions for Writ of Certiorari.

sons were not provided notice of and an opportunity to comment on new evidence that was importantly relied on by the Administrator in deciding to regulate the lead content of gasoline.

2. Whether Congress has delegated to the Administrator the authority to regulate the use of lead additives in gasoline on the basis of a discretionary policy judgment where the scientific and medical evidence as to the effect on the public health of emission products from such additives is speculative and inconclusive.

3. Whether the court below engaged in proper review of administrative agency rulemaking that purports to be based upon scientific and medical evidence where two members of the majority refused to examine the evidence relied upon by the agency to determine whether the agency had made a clear error of judgment.

4. Whether, in any event, it was an abuse of discretion for the Administrator to impose nationally uniform limitations on the lead content of gasoline instead of establishing ambient air quality standards, or providing for regional controls.[2]

STATUTES INVOLVED

The regulations challenged in this case were promulgated by the Administrator of EPA pursuant to Section 211(c) of the Clean Air Act, 42 U.S.C. § 1857f-6c (c), which provides in pertinent part:

> "(c) Control or prohibition of offending fuels and fuel additives.
>
> "(1) The Administrator may, from time to time on the basis of information obtained under sub-

[2] This question is discussed in detail in the Petition for a Writ of Certiorari filed on behalf of National Petroleum Refiners Association from the same Court of Appeals decision; these petitioners incorporate by reference the discussion on this question in that petition.

section (b) of this section or other information available to him, by regulation, control or prohibit the manufacture, introduction into commerce, offering for sale, or sale of any fuel or fuel additive for use in a motor vehicle or motor vehicle engine (A) if any emission products of such fuel or fuel additive will endanger the public health or welfare, or (B) if emission products of such fuel or fuel additive will impair to a significant degree the performance of any emission control device or system which is in general use, or which the Administrator finds has been developed to a point where in a reasonable time it would be in general use were such regulation to be promulgated.

"(2)(A) No fuel, class of fuels, or fuel additive may be controlled or prohibited by the Administrator pursuant to clause (A) of paragraph (1) except after consideration of all relevant medical and scientific evidence available to him, including consideration of other technologically or economically feasible means of achieving emission standards under section 1857f-1 of this title."

The pertinent portion of 5 U.S.C. § 553 (c) provides:

"After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall . . . ."

STATEMENT OF THE CASE

Section 211 (c)(1) of the Clean Air Act authorizes the Administrator of EPA to "control or prohibit" the sale of any fuel or fuel additive "if any emission products of such fuel or fuel additive will endanger the public health or welfare."

Lead additives have been used by refiners of gasoline for more than fifty years. EPA estimated that sales in

1973 would exceed $400 million.[3] The use of lead additives rests upon the basic economics of the refining industry, which require that refiners blend the different distillation products of crude oil to form gasoline with the desired octane rating. Lead additives contribute significantly to energy conservation and cost savings by permitting refiners to increase the yield of gasoline that can be produced from a given volume of crude oil. If lead concentrations are reduced, refiners will be required to add extensive new equipment and to process a significantly greater quantity of crude oil to produce the same quantity of gasoline of a given octane.[4] The emission products of lead additives are not a factor in the photochemical air pollution or smog caused in part by automobile emissions, which is the subject of a regulatory program developed under Section 202 of the Clean Air Act.[5]

Proceedings Before EPA. Acting under Section 211(c)(1), the Administrator published on January 30, 1971, an advance notice of proposed rulemaking relating to the use of lead additives in gasoline.[6] More than a year later on February 23, 1972, the Administrator published proposed regulations requiring a substantial reduction in the lead content of gasoline over

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[3] A. 1615. Record references "A" are to the Joint Appendix filed with the Court of Appeals. In response to a request to transmit that Appendix to this Court, the Clerk of the Court of Appeals advised petitioners that the preferred practice was not to transmit any records in connection with petitions for certiorari, but rather to respond to requests from this Court for such records.

[4] *See* testimony on April 27 and 28, 1972, of William Burnap (pp. 211-212); Allan V. Hoffman (p. 24); Fred L. Hartley (pp. 78-79, 113-114); and Walter Famariss (pp. 516-517). (A. 1998, 2005, 2008-2009, 2013-2014, 2017-2018, 2095-2096) *See also* testimony on May 2, 1972, of Osborne Fremd (p. 202). (A. 1970, 1980)

[5] 42 U.S.C. § 1857f-1.

[6] 36 Fed. Reg. 1486. (A. 26)

the next four years, and mandating the general availability of lead-free gasoline by July 1, 1974.[7] The reduction portion of the proposed regulations was based upon a finding that air lead levels in some, but not all, urban areas were excessive, that motor vehicles were the predominant source of this airborne lead, and that the proposed regulations would result in a reduction of airborne lead to acceptable levels.[8] Interested persons were invited to submit written comments, and public hearings were held on the proposed regulations in the spring of 1972.[9]

Taking into account the criticism that was received from interested parties, including petitioners and governmental agencies, in the comments and at the public hearings, the Administrator decided not to promulgate that portion of the regulations calling for a reduction in the lead content of gasoline.[10] Instead, he reproposed

[7] 37 Fed. Reg. 3882-3884. (A. 22)

[8] These findings were described in the Federal Register statement of February 23, 1972. 37 Fed. Reg. 3882 (A. 22) They were described more fully in a position paper which accompanied the proposed regulations and was entitled "Health Hazards of Lead" (A. 292); as revised and corrected in A. 254 and A. 272.

[9] A: 1970; A. 1998; and A. 2107.

[10] The Administrator did publish in final form on January 10, 1973, regulations requiring, *inter alia*, the general availability of at least one grade of lead-free gasoline by July 1, 1974. These regulations were not based on any determination as to the effect of lead additives upon the public health. They were issued under Section 211 (c)(1)(B) on the basis of a finding that lead-free gasoline was required to permit proper operation of pollution reducing catalytic converters which were expected to appear in 1975 and later model automobiles. 38 Fed. Reg. 1254-1256. (A. 10) These regulations were sustained by the United States Court of Appeals for the District of Columbia in Amoco Oil Co. v. EPA, 163 U.S. App. D.C. 162. 501 F.2d 722 (1974), and are not at issue in this case.

on January 10, 1973, regulations calling for a four-stage reduction in the lead content of gasoline. The Administrator stated that he had "reevaluated" his position on the health effects of airborne lead, that "it is difficult if not impossible" to establish an acceptable level for airborne lead, and that "the original health position can no long[er] be considered sufficient."[11] A "new health position" was adopted based on his opinion that "considerable numbers of urban residents have abnormally elevated" blood lead levels, and that emissions from automobiles contribute to these elevated blood lead levels.[12]

In the January 10, 1973 notice, the Administrator invited public comment for 60 days on the proposed regulations. In response to the request, extensive comments criticizing the Administrator's new position and supporting documents were again received from petitioners and other interested persons, including governmental agencies.

While the Administrator was considering these comments, the Natural Resources Defense Council (NRDC) sought an order from the United States Court of Appeals for the District of Columbia Circuit to compel the Administrator to promulgate lead-limiting regulations. *Natural Resources Defense Council, Inc.* v. *Environmental Protection Agency* (No. 72-2233). The Administrator opposed the NRDC request on the

[11] 38 Fed. Reg. 1258-1261. (A. 14)

[12] 38 Fed. Reg. 1258. (A. 15) The reproposed regulations were accompanied by a second position paper presenting the agency's appraisal of the evidence on this subject. This second position paper was entitled "EPA's Position on the Health Effects of Airborne Lead," November 29, 1972. (A. 158)

ground that very extensive medical and scientific data had been presented and that he was attempting to "make a good faith evaluation of the materials presented to determine the nature of the medical problem of airborne lead, if any, and the most cost effective method of dealing with this problem." [13] The Court of Appeals denied the Administrator's plea and on October 29, 1973, entered an order requiring the Administrator to make a final decision on the matter within 30 days.

In response to the Court's order, the Administrator announced on November 28, 1973, and published in the Federal Register of December 6, 1973, his decision to promulgate regulations calling for a phased reduction in the lead content of gasoline.[14] The regulations were accompanied by a lengthy preamble in which the Administrator, in justifying his decision, relied to a substantial extent upon "new evidence" consisting of scientific and medical studies that had only recently become available to the Administrator and that had not been cited in any previous statement on the subject.[15] According to the Administrator, these new studies established in the case of adults that "airborne lead does contribute significantly to lead exposure in

[13] EPA Opposition to Petitioners "Renewal of Motion for Summary Judgment", pp. 2-3, filed on July 3, 1973 in No. 72-2233.

[14] 38 Fed. Reg. 33734-33741. (A. 1) The regulations were accompanied by still a third position paper, entitled "EPA's Position on the Health Implications of Airborne Lead." (A. 27) The first position paper was entitled "Health Hazards of Lead" (A. 292), and the second was "EPA's Position on the Health Effects of Airborne Lead," November 29, 1972 (A. 158). The shift in titles is indicative of the general weakening in the Administrator's position in response to criticism by the scientific community.

[15] A. 3-5.

the general population,"[16] and that children present a special problem because they may ingest non-food items subject to contamination with lead.[17]

Prior to the promulgation of the final regulations, the Adminstrator did not provide interested parties with notice of or an opportunity to comment on the new scientific and medical evidence relied upon or the new position paper which accompanied the regulations.[18] This occurred despite the fact that the Administrator had received, prior to promulgation, a request from one of the petitioners for an opportunity to comment in the event that the final regulations were based upon different scientific and technical information.[19]

Proceedings in the Court of Appeals. Petitioners sought judicial review of the Administrator's action, contending that the regulations should be invalidated for three basic reasons. First petitioners argued that the evidence does not establish that the emission products of lead additives will endanger public health. In support of this argument they contended that blood

[16] A. 3.

[17] A. 4.

[18] The "new" evidence relied on by the Administrator did nothing to eliminate the uncertainties that had been exposed in his first two attempts to ascertain whether the use of lead additives in gasoline endangers the public health. The studies were largely inconclusive and were conceded by their authors to be preliminary. Nowhere, in the new evidence or in the old evidence, is there any study comparable to the Surgeon General's report on the effect of cigarette smoking on health. (A. 3-5)

[19] See the request from E. I. Du Pont de Nemours and Company, (A. 1965) and EPA's response (A. 1967).

lead levels in the general adult population are not elevated above the limit that the Administrator conceded to be free of adverse health effects.[20] That limit is 40 micrograms of lead per 100 grams of whole blood, referred to as 40 ug.[21] Petitioners argued that lead in the air in community environments does not make a significant contribution to blood lead levels.[22] In the case of children, petitioners argued that, although some children suffer from lead poisoning and elevated blood lead levels, the clear cause is the ingestion of

[20] A. 27, 64 and 97.

[21] There is only one recent comprehensive study which has determined blood lead levels of the general population using subjects throughout the United States. That is the Seven Cities Study which was supported and directed in part by EPA and completed in 1972 (A. 840). Only three of the entire 1,935 people whose blood lead levels were measured in that study (0.15%) had blood lead levels of 40 ug. or greater, and when the original blood samples drawn from these three people were later reanalyzed by the same laboratory, the results were 31 ug, 9 ug, and 36 ug. (A. 2368, 2381) A statistical analysis of the Seven Cities data showed that the number of people having blood lead levels above 40 ug was "zero to four decimal places." (A. 2322, 2351)

[22] This point is well illustrated by data relied upon by Dr. Edward E. David, Jr., then Director of the White House Office of Science and Technology, in criticizing EPA's proposed regulations. (A. 2470-72) The data were as follows:

Table I

	Air Lead (micrograms/M3)	Blood Lead Level (micrograms/100ml)
Pasadena	3.4	17.5
Ardmore (a Philadelphia suburb)	1.15	18.
Los Alamos	0.2	15.

leaded house paint and not lead from automobile emissions in dust and dirt.[23]

Second, petitioners argued that Congress had not delegated to the Administrator the authority to limit the use of lead additives in gasoline where the evidence of their effect on health was speculative and inconclusive.

Third, petitioners argued that the Administrator had not provided an opportunity for interested persons to comment on the recent medical and scientific studies and the position paper which formed the basis for the Administrator's promulgation of the regulations, and that the Administrator had abused his discretion in failing to publish ambient air quality standards for lead.

On December 20, 1974, the Court entered an order setting aside the Administrator's order and regulations. The majority (Judges Wilkey and Tamm) found that the regulations promulgated by the Administrator were invalid on the ground that the Administrator incorrectly interpreted Section 211 (c)(1)(A) of the Clean Air Act, and that, "even assuming the incorrect statutory standard employed by the agency," the Administrator's analysis reflected "a clear error of judgment upon the available evidence."

[23] For example, the Administrator's hypothesis that children ingest lead from automobile emissions in dust and dirt was rejected by Dr. Henrietta Sachs, a pediatrician who established the City of Chicago lead poisoning clinic and directed the screening of approximately 200,000 children in the period from October 1966 to July 1972. Dr. Sachs stated: "I consider the danger from eating dirt infinitesimal unless broken plaster has been thrown into the yard from buildings under repair." (A. 2444, 2448)

(Panel Op. at 69-70) A dissenting opinion was filed by Judge Wright.

On March 17, 1975, the Court granted EPA's petition for rehearing en banc, and vacated the opinion of the panel. The case was argued before eight of the nine judges of the Court on May 30, 1975. (Chief Judge Bazelon was not present at the oral argument.) On March 19, 1976, the Court handed down a five to four decision affirming the Administrator's order and regulations. Five separate opinions were filed, reflecting sharp disagreement about the major issues in this case.

The primary opinion for the majority, which was written by Judge Wright,[24] concluded that petitioners were not deprived of administrative due process by the procedures employed by the Administrator, that the Administrator had properly interpreted Section 211 (c) (1) of the statute, that the Administrator's determination had support in the evidence, but that, in any event, the court was not required to examine carefully the scientific evidence relied on by the Administrator. A separate opinion was filed by Chief Judge Bazelon and Judge McGowan,[25] who concurred in the result reached by the majority but refused to examine the scientific and technical evidence relied upon by the Administrator in reaching his decision. Judge Leventhal filed a separate concurring opinion, asserting that the court was required to conduct a significant review

[24] Judge Wright was one of the two judges who had entered the order of October 29, 1973 compelling the Administrator to make a final decision in thirty days.

[25] Judge McGowan was the second judge who joined in the court's thirty day order of October 29, 1973.

of the factual evidence which was before the Administrator.

The primary dissenting opinion was written by Judge Wilkey with whom Judges Tamm and Robb joined. They concluded that the action of the Administrator was both procedurally and substantively deficient and could not be sustained. A separate dissenting opinion was filed by Judge MacKinnon, who concluded that the Administrator, acting under the impetus of the court's thirty-day order, had failed to comply with the requirements of the Administrative Procedure Act.

REASONS FOR GRANTING THE WRIT

This case raises important questions of federal law which have not been, but should be, settled by this Court. It presents fundamental issues involving the obligations and responsibilities of administrative agencies and reviewing courts in rulemaking proceedings, particularly those that involve assessment of medical and other scientific evidence. The action of the Administrator and the opinions of the Court of Appeals make imperative the need for clarification of the procedures for public participation and comment to be followed by agencies during rulemaking proceedings involving such evidence and the statutory requirement that agencies rest their actions upon factual evidence. In addition, the majority decision of the Court below is in conflict with the decision of this Court in *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402 (1971) as to the role that the reviewing courts should play in environmental regulation.

The lengthy and sharply divided opinions of the Court of Appeals demonstrate the clear need for guid-

ance from this Court. Nine experienced appellate judges differed widely as to whether the Administrator had given due process and otherwise acted in accordance with the mandate of Congress, and as to their own proper function in reviewing the action of the Administrator. The majority opinion expressly recognized "the importance of the issues raised." (Wright Op. p. 113)

In concluding that EPA's action should be sustained, the majority fashioned novel theories of administrative law. It swept aside the well-settled right of interested parties to comment on evidence critical to the agency's decision, the established requirement that an agency make a determination based upon factual evidence, and the safeguard of effective and meaningful judicial review. A determination by this Court is thus essential to clarify for administrative agencies, reviewing courts and the increasingly numerous affected parties, the guidelines for the imposition of pervasive environmental and public health regulations under the Constitution and the mandate of Congress.

I. The Administrator Violated the Requirements of Due Process and the Administrative Procedure Act.

Six members of the Court of Appeals, including two who joined in the majority, seriously questioned the procedure followed by the Administrator. The Administrator had twice before attempted and failed to ascertain, even to his own satisfaction, whether emission products of lead additives in gasoline endangered the public health. He was in the process of evaluating new evidence precisely at the moment when the Court of Appeals, over the Administrator's objection, entered an order requiring final action in 30 days. Faced with

such an order, the Adminisrator did not give interested persons notice of and an opportunity to comment on the new evidence. Instead, he rushed to judgment in response to the order of the Court entered at the behest of a group that demanded a limitation on lead additives, and he promulgated regulations that were based to a substantial extent upon this new evidence.[26]

Two of the requisite members of the majority (Chief Judge Bazelon and Judge McGowan concurring), conceded that the 30-day order may have "interfered with" deliberate consideration by the agency (Bazelon Op. p. 5), acknowledged that the reviewing court was able only "by inference and surmise" to determine the procedural steps followed by the Administrator, and observed that "ordinarily" a case in this procedural posture "would require a remand for clarification." (Bazelon Op. p. 5) The four dissenting judges were in agreement that the Administrator had violated the requirements of the Administrative Procedure Act by failing to give interested persons, including petitioners and other governmental agencies, notice of and an opportunity to comment upon the new evidence which played an important role in the Administrator's deliberations and upon which the Administrator "relied materially" in promulgating the regulations. (Wilkey Op. pp. 19, 32; MacKinnon Op. p. 1)

The extent to which the Administrator relied upon evidence that he did not make available for public comment is set forth in Judge Wilkey's dissenting opinion: five of the six studies relied upon by the Administrator as indicating that lead additives are a

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[26] As to the inconclusive character of the evidence, see footnote 18, *supra*.

hazard to the adult population—the two lead isotope studies, the unpublished Japanese study, the chambers study, and the reanalysis of the Seven Cities study (Wilkey Op. pp. 20-23); and, all five of the studies (two from Newark and one from Philadelphia, Chicago and Rochester) which "were absolutely crucial . . . to the Administrator's entire conclusions in regard to the lead danger to urban children." (Wilkey Op. p. 25) [27]

The majority decision on this issue was contrary to the requirements of the APA, to the teachings of numerous decisions of this Court and even to other decisions of the Court of Appeals—all of which recognize the right of interested persons to participate in rulemaking by commenting upon important evidence relied upon by the agency.[28] This conclusion follows from Section 553(c) of the APA, which provides:

> "After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submisssion of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall . . . ." 5 U.S.C. § 553(c).

Unless interested persons are given notice of and an opportunity to comment upon the evidence critical to an administrative agency's decision, they obviously

[27] Indeed the Administrator characterized this new evidence as "significant new information received since the regulations were reproposed . . . ." (A. 3)

[28] The APA provides that a reviewing court "shall hold unlawful and set aside" agency action taken "without observance of procedure required by law." 5 U.S.C. § 706(2)(D).

cannot "participate" meaningfully in rulemaking proceedings.

Only two years ago, this Court stressed the importance of the right to comment on evidence in an administrative proceeding in *Bowman Transp. Inc.* v. *Arkansas-Best Freight Sys.*, 419 U.S. 281 (1974). The Court stated:

> "A party is entitled . . . to know the issues on which decision will turn and to be apprised of the factual material on which the agency relies for decision so that he may rebut it. Indeed, the Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." 419 U.S. at 288, n. 4.[29]

[29] In International Harvester Co. v. Ruckelshaus, 155 U.S. App. D.C. 411, 478 F.2d 615 (1973), the United States Court of Appeals for the District of Columbia Circuit remanded regulations under the Clean Air Act to EPA where the agency had not given interested persons an opportunity to comment upon the reliability of the methodology which formed the basis for EPA's regulations. Similarly in Portland Cement Ass'n. v. Ruckelshaus, 158 U.S. App. D.C. 308, 486 F.2d 375 (1973), *cert. denied* 417 U.S. 921 (1974) it held that EPA rulemaking under the Clean Air Act was defective where the agency had failed to make available for comment the test results and methodology which formed the basis for the emission control level adopted in the regulations. The Court observed that "it is not consonant with the purpose of a rule-making proceeding" to promulgate rules on the basis of data which to a "critical degree, is known only to the agency." 158 U.S. App. D.C. at 326, 486 F.2d at 393. *See also* Rodway v. United States Department of Agriculture, 168 U.S. App. D.C. 387, 514 F.2d 809 (D.C. Cir. 1975) (holding that USDA's reliance upon agency expertise rather than soliciting comments from interested persons on the basis for the promulgation of food stamp regulations was a violation of Sec. 553(c) of the APA); and Buckeye Power Inc. v. Environmental Protection Agency, 481 F.2d 162 (6th Cir. 1973) (holding that Sec. 553 (c) of the APA was violated where EPA did not allow interested parties an opportunity to comment in a rulemaking procedure under the Clean Air Act.)

The right to comment on the new evidence in this case involves very significant substantative issues. On the two previous occasions that the Administrator had exposed to public and scientific scrutiny his appraisal of the evidence bearing on the effect of lead additives in gasoline upon the public health, that appraisal was severely criticized by numerous persons, including other responsible governmental agencies. The new evidence that the Administrator finally relied upon should have been subject to the same public scrutiny. That evidence, as the Administrator and the majority of the Court of Appeals acknowledged, is at best speculative and inconclusive; it deserved more deliberate and complete consideration.

Consideration by this Court of the Administrator's procedure is all the more necessary because it was an order of the Court below that made it difficult, if not impossible, for the Administrator to grant the right of comment assured by the Administrative Procedure Act.[30] As Judge MacKinnon noted, "it was patently unrealistic" for the Court of Appeals "to believe that the agency could sift through its accumulated data, afford the public and other agencies an opportunity to review any evidence contributed since the end of the last comment period on March 11, 1973, reach a proper decision based on all the evidence and draft the complicated regulations within the required 30

[30] Prior to the promulgation of these regulations, on November 19, 1973, E. I. Du Pont de Nemours and Company requested an opportunity for further comment in the event that the final regulations differed from the previously proposed regulations or were based upon different scientific and technical arguments and data than those previously announced. (A. 1965) This request was denied on December 4, 1973—after the regulations were promulgated. (A. 1967)

days." (MacKinnon Op. p. 1)[31] The Administrator was faced with time constraints imposed by the court that made it "impossible . . . to comply with the notice and comment requirements of the Administrative Procedure Act." (MacKinnon Op. p. 1)

Review by this Court is thus appropriate to make clear to administrative agencies and reviewing courts that the right to comment on critical evidence cannot be short-circuited in rulemaking proceedings—even under the pressure of a court order. As the dissent noted, the approach taken by the majority in this case permits the agency to "keep secret information important to its decision" and "affords no opportunity for informed public comment." (Wilkey Op. pp. 32-33) This approach should not be permitted to stand. Agencies cannot be permitted to maintain critical evidence in secret, divulging it only when rules are promulgated.

II. Authority Has Not Been Delegated by Congress to the Administrator to Make a Discretionary Policy Judgment Based Upon Speculative and Inconclusive Scientific and Medical Evidence.

In promulgating these regulations, the Administrator never claimed in the preamble or in the accompanying position paper that the evidence bearing on the effect of lead additives on the public health is definitive or that further information is not required.

[31] According to Judge MacKinnon, the result of the court's order was to force "a hasty decision" from the agency on a "highly complicated matter." (MacKinnon Op. p. 2) The anomaly here is that two members of the majority felt that the facts in this case were too complex for them to review meaningfully; and yet the Court did not believe that the complexity of the matter precluded an order requiring final agency action within an arbitrary 30 days.

Instead, the Administrator acknowledged that he was acting upon the basis of "a hypothesis,"[32] that "not all links in the argument have been established beyond dispute,"[33] and that "[f]urther information is required."[34] Similar expressions of uncertainty occur throughout the preamble to the regulations and in the position paper. In short, the Administrator has conceded the speculative nature of his determination that the emission products from lead in gasoline will endanger the public health. Even the majority opinion noted that "hard proof of any danger caused by lead automotive emissions has been hard to come by." (Wright Op. p. 9)

The majority concluded that the Administrator was warranted in acting under Section 211(c) notwithstanding the state of the evidence because the determination under that section is "necessarily a question of policy that is to be based on an assessment of risks and that should not be bound by either the procedural or the substantive rigor proper for questions of fact." (Wright Op. p. 46) The majority expressly stated that it would "not demand rigorous step-by-step proof of cause and effect" because questions "involving the environment are particularly prone to uncertainty." (Wright Op. pp. 54, 46) The majority tolerated "speculation, conflicts in evidence, and theoretical

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[32] 38 Fed. Reg. 33735. (A. 3)

[33] 38 Fed. Reg. 33736. (A. 4)

[34] EPA's Position on the Health Implications of Airborne Lead, p. VI-13. (A. 123) *See also*, an EPA internal memorandum of August 3, 1973, in which two officials of EPA's Office of Planning & Evaluation stated that "no concrete link has been established between lead from automotive exhausts and harmful health effects." (A. 1053, 1057)

extrapolation" because the agency is "given a mandate to protect the public health but only a slight or nonexistent data base upon which to draw." (Wright Op. p. 47)

In contrast, the dissenting opinion rejected the view that Section 211(c)(1)(A) is a "delegation of quasi-legislative power to the Administrator and not a requirement that he reach a reasoned determination purely on the scientific and medical data." (Wilkey Op. p. 55) It emphasized that the majority's view is directly inconsistent with the intention of Congress as shown by the legislative history and the language of Section 211, particularly when compared with other sections of the statute. From its analysis of the legislative history and the statute, the dissent concluded that the threshold determination of whether lead additives "will endanger" the public health turns "crucially on factual issues and not upon choices of policy." (Wilkey Op. p. 57)[35]

It is respectfully suggested that the view of the dissent is correct. The legislative history makes clear that Congress, in enacting Section 211(c), realized that the regulation of gasoline and its additives poses complex and important questions concerning this country's use of a vital natural and economic resource. Accordingly Congress, despite strong urgings from

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[35] The dissenting opinion reached an alternative conclusion that, even assuming the correctness of the Administrator's interpretation of the statute, "his analysis reflected a clear error of judgment upon the available evidence." (Wilkey Op. p. 85) According to the dissenting opinion, the Administrator's "choice here is only a guess, not an expert judgment drawn from conflicting evidence"; "the logic of his conclusion has great gaps in the chain"; and "the evidence to support his conclusion is totally insufficient." (Wilkey Op. p. 16, n.28)

environmental groups, refused to ban lead additives in gasoline as a matter of legislative policy. Instead, it required that before the Administrator exercises the authority delegated to him he must find on the basis of scientific and medical evidence that the use of the additive involved "will endanger the public health;" and it specified that no fuel additive may be controlled or prohibited by the Administrator except upon the basis of such evidence.[36] Congress did not contemplate action on the basis of surmise, or apprehension on the part of environmental groups, of which it was fully aware when it delegated limited authority to the Administrator.[37]

If the Court of Appeals decision is permitted to stand, administrative regulations in many environmental and public health areas could be justified as a "legislative policy judgment" despite the lack of a solid factual basis or even with a "nonexistent data base." (Wright Op. p. 47) Relieved of the necessity of being responsible to reviewing courts, administrative agencies would then be encouraged to act without

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[36] Section 211(c)(2)(A). 42 U.S.C. § 1857f-6c(c)(2)(A).

[37] H. Rep. No. 91-1146, 91st Cong., 2d Sess. 13 (1970). The Chairman of the House Committee which reported the Act, Rep. Staggers, stated that the Administrator could control additives "[i]f he has the facts, and he has proven this by facts, that they are a danger and poisonous." 116 Cong. Rec. 19230. The Administrator does have authority under different provisions of the Act, to adopt regulations dealing with indirect or inadequately proven health effects of auto emissions. *See, e.g.* Section 202 (a) of the Clean Air Act, 42 U.S.C. § 1857f-1, which gives the Administrator authority to control the emission of a pollutant which "in his judgment causes or *contributes* to, or is *likely* to cause or to contribute to, air pollution which endangers the public health or welfare." (Emphasis added.)

a careful or thorough analysis of the relevant scientific and medical evidence.

III. Judicial Review of Agency Rulemaking That Is Based Upon Scientific and Medical Evidence Requires a Thorough Examination by the Court of the Evidence Relied Upon by the Agency To Determine Whether There Has Been a Clear Error of Judgment.

The opinions of the members of the Court of Appeals reflect quite different understandings of, and sharp disagreement as to, the scope of judicial review of agency rulemaking based upon scientific and technical evidence. (See Wright Op. pp. 66-74; Bazelon Op. pp. 1-4; Leventhal Op. pp. 1-4; and Wilkey Op. pp. 57-64)

The opinion of Judge Wright found confusion in the language of this Court in *Citizens to Preserve Overton Park* v. *Volpe,* 401 U.S. 402 (1971), observing that "the Court's intent in *Overton Park* [is] somewhat difficult to plumb and its standard even more uncertain of application." (Wright Op. p. 70, n. 74) Because Judge Wright thought that the language in *Overton Park* "may unintentionally prompt judicial distortion of the 'arbitrary and capricious' standard," he acknowledged that the Court was required to engage in a "close scrutiny of the evidence"; indeed "the more technical the case, the more intensive must be the court's effort to understand the evidence." (Wright Op. pp. 70-72)

Judge Wright's analysis of the evidence, however, was not the basis for the majority opinion. Rather he concluded that "the ultimate standard of [judicial] review is a narrow one," and that the Court's obligation to review was fully satisfied by a determination that "the agency decision was rational and based on consideration of the relevant factors."

(Wright Op. pp. 72-73) Thus, in sustaining what it regarded as the Administrator's determination of policy, the majority declined to let judicial review "be bound by either the procedural or the substantive rigor proper for questions of fact." (Wright Op. p. 46)

The concurring opinion of Judges Bazelon and McGowan, whose votes were necessary to sustain the Administrator's action, not only subscribed to the limited concept of review actually applied by the majority, but refused to make any examination of the underlying evidence. Their concept of judicial review, as perceived by Judge Leventhal in a separate concurrence, "advocates engaging in no substantive review at all, whenever the substantive issues at stake involve technical matters that the judges involved consider beyond their individual technical competence." (Leventhal Op. p. 1) Indeed, the concurring opinion of Judges Bazelon and McGowan candidly recognizes that the extended discussion of the evidence in Judge Wright's opinion is unnecessary and distracting in light of the standard of review that ultimately governed the action of the majority. They concurred in the Court's opinion only because it would "bar" a "close analysis of the evidence," and they rejected the majority's "exhaustive analysis of the scientific evidence" as "unnecessary." (Bazelon Op. p. 4)[38] This conclusion followed from their expressed view that "substantive review of mathematical and scientific evidence by technically illiterate judges is dangerously unreliable." (Bazelon Op. p. 3) [39]

[38] Chief Judge Bazelon and Judge McGowan also observed that they concurred in the opinion of Judge Wright only because it "severely limits judicial weighing of the evidence by construing the Administrator's decision to be a matter of 'legislative policy', and consequently not subject to review with the 'substantive rigor proper for questions of fact.'" (Bazelon Op. p. 4)

Nowhere in the concurring opinion of Judges Bazelon and McGowan is there any attempt to show by reference either to statutory language or legislative history why judicial review of the Administrator's action in this case should differ so substantially from judicial review of agency action in other situations. Certainly the language of the Clean Air Act contains no suggestion that the review envisaged by Congress is to be any less rigorous than the review Congress has traditionally provided for in numerous regulatory statutes passed over the years. In the course of the argument Judge McGowan questioned whether substantive judicial review might unconstitutionally involve the courts in what he characterized as essentially legislative activity. Any uncertainty as to the permissibility, indeed perhaps necessity, under the Constitution of providing for meaningful judicial review of agency action in health and scientific matters should certainly be dispelled by this Court.

Judge Leventhal disagreed with Judges Bazelon and McGowan as to the proper scope of judicial review of agency action in cases of this kind and asserted the propriety of "substantive review of administrative action" under this Court's decision in *Overton Park*, which "requires the reviewing court to scrutinize the facts."

[39] As Judge Leventhal noted, courts are frequently called upon to decide cases involving scientific and technical facts in a number of substantive areas including of course patent infringement. Congress obviously could have created specialized courts to review such actions, but by not doing so, Congress intended that the Courts of Appeal would attempt to educate themselves on the issues involved. (See Leventhal Op. p. 2)

(Leventhal Op. pp. 2-3) In his view "if there is some factual support for the challenge, there must be either evidence or judicial notice available explicating the agency's result, or a remand to supply the gap." (Leventhal Op. p. 3) The dissenting opinion by Judge Wilkey found no confusion or uncertainty in this Court's decision in *Overton Park* and stated that it meant that reviewing courts are "obligated to engage in a 'substantial inquiry' " into the facts to determine if the agency had made a "clear error of judgment." (Wilkey Op. p. 58)

These sharp differences among the members of the Court of Appeals reflect widespread uncertainty on their part as to the proper scope of judicial review in light of *Overton Park*. The same difficulties have been expressed in numerous other decisions of that court.[40]

[40] *See e.g.*, the following decisions holding that judicial review of agency action requires a thorough examination of the scientific facts and evidence relied upon by administrative agencies: International Harvester Company v. Ruckelshaus, 155 U.S. App. D.C. 411, 478 F.2d 615 (D.C. Cir. 1973) (opinion by Judge Leventhal, exhaustively reviewing the scientific evidence relied upon by EPA and concluding that the technical facts require "a different approach" from that taken by the agency); National Tire Dealers and Retreaders Association v. Brinegar, 160 U.S. App. D.C. 238, 244, 491 F.2d 31, 35 (D.C. Cir. 1974) (opinion by Judge Wilkey, holding invalid Department of Transportation regulations on the ground that the agency's conclusions were cast into doubt by specific technical comments in the record); Portland Cement Association v. Ruckelshaus, 158 U.S. App. D.C. 308, 486 F.2d 375, 402 (1973), *cert. denied* 417 U.S. 921 (1974) (opinion by Judge Leventhal observing that judicial review of agency decisions requires "steeping in technical matters.") In contrast, *see e.g.*, the following decisions holding that the court's responsibility is not to examine in detail the scientific facts and evidence relied upon by agencies: Industrial Union Department v. Hodgson, 162 U.S. App. D.C. 331, 338-9, 499 F.2d 467, 474-5 (D.C. Cir. 1975) (opinion by Judge McGowan characterizing the promulgation of regulations "on the frontiers of scientific knowledge" as questions of "policy" not subject to the same review as questions of fact); O'Donnelly v. Schaffer, 160 U.S. App. D.C. 266, 269, 491 F.2d 59, 62 (D.C. Cir. 1974) (opinion by Chief Judge Bazelon, giving great deference to the decision of the agency where "complex technical issues are involved"); and *see also* the concurring opinion of Chief Judge Bazelon in International Harvester Company v. Ruckelshaus, 155 U.S. App. D.C. 411, 478 F.2d 615 (D.C. Cir. 1973), observing that "in cases of great technological complexity, the best way for courts to guard against unreasonable or erroneous administrative decisions is not for the judges themselves to scrutinize the technical merits of each decision."

Thus, depending upon the panel assigned to a given case, a court may engage in an analysis of the agency's evidence, or it may merely limit itself to determining whether the agency gave consideration to the evidence in a formal sense. These uncertainties are particularly unsettling because the Court of Appeals for the District of Columbia Circuit has been entrusted with exclusive review of administrative agency action under numerous statutory provisions, including Section 211 of the Clean Air Act.[41] In view of the exclusive judicial review

[41] 42 U.S.C. § 1857h-5(b)(1) provides that judicial review of EPA action under Section 211 shall be available exclusively in the United States Court of Appeals for the District of Columbia Circuit. *See also* 42 U.S.C. § 4915 (promulgation of noise control regulations by EPA); 42 U.S.C. § 300j-6 (promulgation of national primary drinking water regulations under the Safe Drinking Water Act). Similarly other provisions of the Clean Air Act involving nationwide regulatory programs vest exclusive jurisdiction for judicial review in the United States Court of Appeals for the District of Columbia Circuit. *See* Sections 1857c-6, 1857c-7, 1857f-1, 1857f-6c, 1857f-9. As the Court of Appeals for the District of Columbia Circuit pointed out in Natural Resources Defense Council, Inc. v. Environmental Protection Agency, 168 U.S. App. D.C. 111, 114, 512 F.2d 1351, 1354 (D.C. Cir. 1975), Congress considered such exclusive judicial review "necessary to preserve the 'even and consistent national application of standards . . .' (citing S. Rep. No. 91-1196, 91st Cong., 2d Sess. 40-41 (1970))."

vested in that court, the disagreement among the members of the court as to the nature of their review function has an effect comparable to a conflict between circuit courts of appeals and affords a further reason for granting a writ in this case.

Only this Court can remove the ambiguity found by the majority of the Court of Appeals to be inherent in *Overton Park,* as that decision applies to agency action based upon scientific and technical evidence. The Court should make clear that reviewing courts have an obligation to make a searching and careful inquiry into the facts in reviewing such action, and that on the basis of such an inquiry the reviewing court must determine whether the agency has made a clear error of judgment. Such review is essential if the courts are to perform the important role that Congress has entrusted to them. Congress expected reviewing courts to provide balance and proportion to the process of administrative regulation in environmental and other technical areas. Administrators by their nature are the subject of intense political pressures. All too often the most vocal or most persistent group ultimately prevails; the most popular cause is adopted. The reviewing court can scrutinize agency action free of such pressures, and Congress meant that it should.

It is particularly important for the Supreme Court to resolve this issue in this case. The concurring opinion of Judges Bazelon and McGowan indicates that they did not scrutinize the evidence relied upon by the Administrator as required by *Overton Park.* Indeed, this was precisely Judge Leventhal's interpretation of their concurring opinion. As a result, only three of the five majority judges were able to form any conclusion as to the adequacy of the evidence relied upon by the

Administrator. On the other hand, four dissenting judges found that the evidence did not meet the required standard. A five to four decision affecting very substantial rights should not be permitted to stand where two members of the majority did not examine, in the manner required by this Court, the evidence relied upon by the Administrator.

CONCLUSION

Petitioners respectfully request that this Petition for a Writ of Certiorari be granted.

Respectfully submitted,

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